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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 325

EVE SPIRO JOHN,

Petitioner,

vs.

TRIBUNE COMPANY, a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

SIDNEY Z. KARASIK
135 South LaSalle Street
Chicago 3, Illinois
Attorney for Petitioner

CHICAGO LAW PRINTING CORP., 189 W. MADISON, CHICAGO FRanklin 2-6521

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Eve Spiro John, respectfully prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Illinois entered on January 23, 1962. A timely petition for rehearing was filed, but denied on May 23, 1962.

OPINIONS OF THE COURTS BELOW

The opinion of the Supreme Court of Illinois (two Justices dissenting,) is reported at 24 Ill. 2d 437, 181 N.E. 2d 105 (Appendix I *infra.*)

The first opinion of the Appellate Court of Illinois is reported in 19 Ill. App. 2d 547, 154 N.E. 2d 862 (Appendix II, *infra*).

The second Appellate Court opinion is reported in 28 Ill. App. 2d 300, 171 N.E. 2d 432 (Appendix III, *infra*.).

JURISDICTION

The jurisdiction of the Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Consistent with the requirements of due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution, may a State through the action of its highest tribunal, abrogate the old common law tort of libel by fashioning a special and unique rule of law (styled the "innocent construction" rule) which favors defendant publishers with a complete defense regardless of the effect of the defamation published?

2. May the petitioner be deprived of her right to a jury trial in an action for libel by the judicial abridgment of the general principles of tort heretofore held by this Court to be applicable to such actions?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution provides: . . . "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A suit for libel was brought by the petitioner (hereinafter referred to as the "plaintiff") against the Tribune Company (hereinafter referred to as the "defendant"). The basis of the suit was the publication by the defendant of two news stories which plaintiff alleged libeled her.

The stories described a raid made by the police on an apartment building at 4417 South Ellis Avenue, in Chicago, Illinois, in which a number of women were arrested.

The first publication read:

> "Five women, one identified as a former girl friend of Tony Accardo, Capone gangster, were seized by Vice Squad police last night in a raid on a lavishly furnished nine-room apartment at 4417 Ellis Avenue.
>
> "Detectives Jack Woessner, Edward Puhr, and Patrick Rafferty said they made the raid after an unnamed policeman paid a $100 fee to one of the women to obtain evidence of prostitution in the apartment. Two men seized as they were entering the apartment were questioned and released.
>
> "Dolores Reising, 57, alias Eve Spiro and Eve John, who police said, was known years ago as Accardo's woman friend, was held as the suspected keeper of the apartment."

The second publication was:

> "Five women arrested by detective Jack Woessner and Edward Puhr of Hyde Park Station in a vice raid at 4417 Ellis Avenue, Saturday night, will appear in Women's Court Wednesday.
>
> "Dorothy Clark, 57, who gave 4417 Ellis Avenue as her address, was charged with being keeper of a disorderly house and selling liquor without a license.

> Police said she is also known as Dolores Reising, Eve Spiro and Eve John, and was known years ago as a girl friend of Tony Accardo, Capone gangster." (Appendix I, *infra*, pp. 1a, 2a.)

Plaintiff's name at the time of the said arrest was Eve John, and her maiden name was Eve Spiro. She was 27 years old, a practicing psychologist, and resided in a basement apartment in the building raided, with her two minor children. She was the only person with that name at the address stated in the news stories. She was not present in the raid and was not arrested. (Appendix II, *infra*, p. 12a.)

In plaintiff's complaint, as ultimately amended, she alleged that the articles were understood by readers of defendant's newspaper to refer to her, that the statements in the article were false as to her and had seriously damaged her reputation and caused her severe mental and physical distress and loss of practice as a psychologist. (Appendix I, *infra*, p. 2a.)

The trial court, having sustained defendant's motion to dismiss, the plaintiff appealed. The Appellate Court of Illinois reversed and held that the language of the stories was libellous *per se*. The Appellate Court said:

> "What is presented for trial in this case is a question of fact, and not of law. The question is whether readers of the articles did and could reasonably understand them to refer to plaintiff." (19 Ill. App. 2d 547, 171 N.E. 2d 432, 435) (Appendix II, p. 15a, *infra*.)

The case was remanded to the circuit court for trial. The defendant thereupon filed an answer to the amended complaint denying that it published the articles with the intent to injure the plaintiff in her good name, and denied that the statements in the article concerning Eve Spiro and

Eve John referred to the plaintiff. Defendant's answer stated that it had no knowledge concerning what person other than the plaintiff at 4417 Ellis Avenue used the names "Eve Spiro" and "Eve John" save "that defendant is informed and believes that plaintiff's landlord who resided on the premises has on occasions, used said names." Defendant denied that it meant by the articles that plaintiff was unchaste and had been an inmate of a resort for dissolute persons, that the publications were so understood by readers of the papers, and denied that the articles charged the plaintiff with any wrongdoing whatsoever, or that the plaintiff has by the publication of the articles been injured in her reputation. (Appendix III, p. 17a *infra.*)

A trial was held and the jury returned a verdict for the defendant. Plaintiff again appealed to the Appellate Court contending that she did not receive a fair trial because of the prejudicial error committed by the trial court in excluding proper evidence offered by plaintiff and admitting immaterial or prejudicial evidence on the part of the defendant, and the giving of improper jury instructions.

The Appellate Court again reversed, this time for trial errors, and remanded the cause for a new trial (28 Ill. App. 300, 171 N.E. 2d 432, Appendix III, p. 17a, *infra.*) The Appellate Court refused to strike the remanding portion of its judgment of reversal, but the Supreme Court of Illinois allowed defendant's petition for leave to appeal.

The Illinois court then proceeded to review the decision of the Appellate Court on the first appeal, and held that as a *matter of law*, no cause of action was stated by the complaint. The Supreme Court held that the subject of the articles was the keeper of the disorderly house, "Dorothy Clark", or "Dolores Reising" and that the other

names used as "aliases" as a *matter of law* could only be understood as referring to the "madam" and not to the plaintiff, whose names they were; that the publications therefore as a *matter of law* were "not of and concerning" the plaintiff.

In reaching these conclusions, the Supreme Court of Illinois said:

> "We further believe the language in defendant's articles is not libellous of plaintiff when the innocent construction rule is consulted. That rule holds that the article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libellous that are capable of being read innocently must be so read and declared non-actionable as a matter of law. Although this court has not heretofore expressed the rule, it has been adopted and applied by our Appellate Courts and by Federal Courts sitting in Illinois * * * (cases cited) * * * since both the publications here are capable of being construed as referring only to Dorothy Clark-Dolores Reising as the keeper of the disorderly house, they are innocent publications as to the plaintiff." (24 Ill. 2d 437, 442; Appendix I, p. 1a *infra*)

The federal question in the instant case was first raised by petitioner in her petition for rehearing, filed in season with the Supreme Court of Illinois. This was the first opportunity in the course of proceedings below in which it was necessary or appropriate for the petitioner to raise a federal question.

Since the opinion of the Illinois high court concedes that the so-called "innocent construction" rule had not theretofore been "expressed" by the court, the decision could not have been foreshadowed by any prior decisions of the court. (On the contrary, prior decisions, as shown *infra*, followed orthodox principles in libel cases).

Under the "surprise doctrine" it is believed that petitioner properly raised a substantial federal question on her petition for rehearing because the federal question was born in the court's decision. In a number of cases where such surprise is shown, the raising of a federal question on a petition for rehearing was deemed timely, where the litigant had no occasion to assert a claimed federal right or immunity prior to the decision of the state high court. (*Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673; *Missouri ex rel. Missouri Insurance Co.* v. *Gehner*, 281 U.S. 313, 320; *McGarrity* v. *Delaware River Bridge Commission*, 292 U.S. 19, 20; *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358.)

In her petition for rehearing (part of the Record herein) petitioner stated the federal question in the following terms:

> "The court's decision fashions a special rule of law for publishers and raises a constitutional question in that plaintiff is deprived of her right to a jury trial under the XIV Amendment to the Constitution and Article II, §5 of the Illinois Constitution."

* * *

> ". . . the Court will have extended the innocent construction rule to the words libelous *per se*, and will have deprived the plaintiff of a jury trial of her constitutional rights". (Rec. 22, and PETITION 1, 5)

The Supreme Court of Illinois, on May 23, 1962, denied the petition for rehearing without modifying its opinion or passing upon the federal question raised by the petitioner.

REASONS FOR GRANTING WRIT

1. The importance of the case transcends the immediate parties and brings into question the utility of the action for libel. While Freedom of the Press is vouchsafed by the First and Fourteenth Amendments, the traditional action for libel has been deemed and treated as a well-staked exception to the Constitutional guarantee. *Roth* v. *United States,* 354 U.S. 476, 483, 486; *Beauharnais* v. *Illinois,* 343 U.S. 250, 266.

In its petition for leave to appeal to the Illinois Supreme Court, defendant in the instant case had complained of the "risk"[1] which a newspaper publisher takes in listing the aliases of public enemies and disreputable persons. Defendant argued that the Illinois Appellate Court's first decision "vitiated" a publisher's constitutional "freedom to print the truth". (Rec. 2, PETITION 22)[2]

As if tacitly accepting defendant's contentions, the Illinois court proclaimed the "innocent construction" rule, admittedly for the *first time* in that court, and for the *first time in any* court applied the rule to language which traditionally has been considered libellous *per se.* While defendant may assert the rights of a publisher, (supposedly as a public service) to expose the "aliases" of underworld and disreputable characters without risk of libel suits on

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[1] Notwithstanding the classic dictum of Lord Mansfield "whatever a man publishes, he publishes at his peril" *The King* v. *Woodfall* Loft 776, 781, quoted by Justice Holmes in *Peck* v. *Tribune,* 214 U.S. 185, 189.

[2] Article II, §4 of the Illinois Constitution, provides:

> "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." Smith-Hurd Ill. Rev. Stats., 1961, Constitution of Illinois of 1870.

the issue of identity (or of any other matter having the slightest "innocent" tinge), in many other branches of the law identity is a question of fact—left to the trier of fact. The Illinois court has transformed such a traditional question into a matter of law and resolved it in favor of publishers.

If "innocent construction" shall now become the test of publications, *no matter how flagrant the defamation*, then predictably publishers will raise a gossamer-woven, but invulnerable shield of "innocence" to fend off *all* actions for libel. The "innocent construction" rule, therefore is a judicial gift of privilege to a limited class—namely, publishers.

Significantly, no other jurisdiction has a counterpart of the so-called "innocent construction rule". The instant case however, has already been cited (even prior to the denial of the then pending petition for rehearing) as the law of Illinois by the Court of Appeals for the Seventh Circuit in *Porcella* v. *Time, Inc.*, 300 F. 2d 162 (CCA 7th, May 1962). One Circuit Justice, however, was prompted to state:

> "I expressly refrain from joining in the application of the innocent construction rule as stated by the Illinois Supreme Court in *John* v. *Tribune Co.*, . . ." (300 F. 2d 162, 168)

2. A special rule of law, subtly fashioned to immunize publishers from the consequences of defamatory publications, is a drastic modification of a traditional remedy and offends the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Granting that the federal Constitution does not guarantee that decisions of State courts shall be free from error (*Ballard* v. *Hunter*, 204 U.S. 241, 258; *West* v. *Louisiana*, 194 U.S. 258) nevertheless, it is respectfully tendered to

this Court, that the so-called "innocent construction" rule adopted by the Illinois court is such a freakish encrustation on the body of the common law as to contravene due process and "equal protection of . . . equal laws" (*Yick Wo* v. *Hopkins*, 118 U.S. 356, 369)

Although no one has a vested interest in a rule of law as such, or in any particular form of remedy, it was held in *Coombs* v. *Getz*, 285 U.S. 434 that the withdrawal or change of remedy in violation of interests already vested or impairment of substantial rights, constitutes a denial of due process. And in *Truax* v. *Corrigan*, 257 U.S. 312, the court held that the arbitrary and unreasonable abolishment of a right of action to redress injury to essential rights of a person (*inter alia*, the right to be free from libel) falls within the prohibition of the Due Process clause.

The vice of the "innocent construction" rule is that it grants to a certain limited class, namely, publishers, an immunity from the law for the consequences of defamatory publications without regard to the injury resulting from the publication. It is submitted that the abrogation or modification of the traditional remedy of libel by the action of the State's highest tribunal, is no less offensive to the Due Process and Equal Protection clauses than a State statute[3] which has that effect. (*Shelley* v. *Kraemer*, 334 U.S. 1; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 680).

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[3] In *Park* v. *Detroit Free Press Co.*, 72 Mich. 560, 40 N.W. 731 (1888) a Michigan statute limiting recovery to actual damages for "innocent" libel, was held "unconstitutional". The court said:

> "There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty or property. It is one of those rights necessary to human society that underlies the whole social scheme of civilization. It is a thing which

In *Truax*, the court said:

> "Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or in deprivation of rights permitted, worked against, a larger class." 257 U.S. 312, 333.

3. The Illinois court has ignored general principles of tort and has relegated the traditional action of libel to a useless action.

This Court has rarely had to consider civil libel cases, but in 1909, Justice Holmes, pertinently observed for a unanimous court in *Peck* v. *Tribune Co.*, 214 U.S. 185, 189-190 (where, as here, defendant had erroneously libelled plaintiff through a confusion of two persons):

> "It may be that the action for libel is of little use, but *while it is maintained, it should be governed by the general principles of tort.* (Emphasis added)

Under the general principles of tort, and specifically the tort of libel, language which is clearly defamatory on its face, *i.e.*, libellous *per se*, cannot be tested by "innocent construction" and the court may not pre-empt the jury's function of determining whether the published words are "of and concerning the plaintiff".

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is more easily injured than restored and where injury is capable of infinite mischief . . . " (72 Mich. 560, 566, 40 N.W. 731, 733)

As an additional vice of the statute, there involved, the Michigan Court noted:

> "This statute has not apparently attempted to relieve any persons *but the publishers of newspapers* from responsibility for every injury to character by libel, whether intentionally false or not . . . " 72 Mich. 560, 566, 40 N.W. 731, 733) (Emphasis added).

"There is," says Chafee, "a very strong policy in American law that most of the material issues in a libel action should be determined by a jury. This tradition goes back to the eighteenth-century controversy over the respective functions of judge and jury in trials for seditious libel, where the Crown wished to limit the scope of the jury in order to obtain easier convictions. English events in this controversy were eagerly followed by the colonists, who had become familiar with it in the famous *Zenger* case. Eventually the liberals established the wide powers they desired for the jury, by Fox's Libel Act in England (1792) and by state constitutions or statutes in this country. Although these enactments apply in terms only to prosecutions for writing and print, their emphasis on the jury is extended to civil actions brought by individuals. Consequently, the jury has a very large control over the actual administration of the libel rules already outlined. It is significant that in England, where jury trials in civil actions have been pretty much abandoned, they are still preserved for defamation suits. In short, the question whether the plaintiff's reputation in the sight of his neighbors has been injured is mainly referred to twelve of those neighbors for decision." Zachariah Chafee, Jr., *Government and Mass Communications*, p. 188.

Identification of a respectable woman as a madam of a house of prostitution and as a gangster's moll, cannot be innocently construed. Derrogation of a woman's chastity is the Horn book example of libel *per se*. A reputable woman can scarcely suffer greater exposure to public scorn and disgrace than plaintiff did by reason of defendant's publications.

The Illinois court also ignored a firmly cemented principle in the tort of libel that a publisher is responsible for *inadvertent* as well as *intentional* defamation. (*Peck* v.

Tribune Co., 214 U.S. 185; *Palmer* v. *Bennett*, 31 NY Supp. 567; *Ball* v. *Evening American Publishing Co.*, 237 Ill. 592,

> "'Liability for libel does not depend upon the intention of the defamer, but on the fact of defamation'" (Gatley, Libel and Slander, 4th Ed. 1953, p. 130);

or, as aptly stated by the New York Court of Appeals in *Corrigan* v. *Bobbs-Merrill Co.*, 228 N.Y. 58, 126 N.E. 260, 262:

> "The question is not so much as who was aimed at as who was hit."

In *Peck* v. *Tribune Co.*, 214 U.S. 185, 190, this Court said:

> "If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote."

But the Illinois court, in the instant case has effectively nullified the remedy for civil libel by denying a jury trial on palpable questions of fact as to whether the publications were "of and concerning" the plaintiff in the estimation of a respectable portion of readers of the newspaper who knew the plaintiff and might infer that she was the person meant by the articles[4].

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[4] The Illinois Court's decision cannot be reconciled with its earlier opinion in *Ball* v. *Evening American Publishing Co.*, 237 Ill. 592, which is in harmony with the general law of tort in the United States. There the court duly noted the separate functions of the court and of the jury in the construction of an allegedly libellous matter and of the identity of the person meant. The court said, at p. 600:

> "It is elementary that an alleged libelous publication must be interpreted in the sense *in which readers would understand it*, and in this state it has been held in slander suits that the testimony of the hearers as to the sense in which they understood the words spoken is admissible . . . .Where the words are ambiguous or equivocal in meaning, the question of the meaning to be ascribed to them *is for the jury*, although the question as to whether or not any particular meaning is libelous is, of course, for the court. Where, as here, there is a *controversy* as to whether or not the words were published *of and concerning the plaintiff, the question whether they were so spoken is for the jury.*" (Emphasis added)

Under the circumstances in the instant case, adequately detailed by the Appellate Court in its first opinion (Appendix *infra* p. 12a) the question could, only as a matter of fairness and in conformity with "general principles of tort" be resolved as one of fact for the trier of fact.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY Z. KARASIK

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Counsel for Petitioner

APPENDIX I

SUPREME COURT OPINION

Mr. JUSTICE DAILY delivered the opinion of the court:

Plaintiff, Eve Spiro John, instituted a libel action in the circuit court of Cook County to recover damages from the defendant, Tribune Company. There was a verdict and judgment for defendant, and plaintiff appealed to the Appellate Court, where the judgment was reversed and the cause remanded for a new trial. (*John* v. *Tribune Co.*, 28 Ill. App. 2d 300.) We have allowed defendant's petition for leave to appeal, despite the refusal of the Appellate Court to strike the remanding portion of its order in accordance with section 75(2)(c) of the Civil Practice Act, (Ill. Rev. Stat. 1959, chap. 110, par. 75(2)(c),) and have taken with the case a motion by defendant that this court grant such relief as may be necessary to require the Appellate Court to strike the remanding order.

Essential background for a consideration of the issues raised here show that the suit for libel was generated by a raid made by Chicago police on 4417 South Ellis Avenue in Chicago, after they had received a report that immoral activities were occurring at such address. The building was an apartment building and, at the raid, the building's owner, Dorothy Clark, and several women found in her apartment were arrested and charged with prostitution. Defendant first published a story about the raid and a second story about the court appearance of those arrested. The first publication read:

"Five women, one identified as a former girl friend of Tony Accardo, Capone gangster, were seized by vice-squad

police last night in a raid on a lavishly furnished nine-room apartment at 4417 Ellis Avenue.

"Detectives Jack Woessner, Edward Puhr, and Patrick Rafferty said they made the raid after an unnamed policeman paid a $100 fee to one of the women to obtain evidence of prostitution in the apartment. Two men seized as they were entering the apartment were questioned and released.

"Dolores Reising, 57, alias Eve Spiro and Eve John, who, police said, was known years ago as Accardo's woman friend, was held as the suspected keeper of the apartment."

The second publication was:

"Five women arrested by Detectives Jack Woessner and Edward Puhr of Hyde Park station in a vice raid at 4417 Ellis Ave. Saturday night will appear in Women's court Wednesday.

"Dorothy Clark, 57, who gave 4417 Ellis Av. as her address, was charged with being keeper of a disorderly house and selling liquor without a license. Police said she also is known as Dolores Reising, Eve Spiro, and Eve John, and was known years ago as a girl friend of Tony Accardo, Capone gangster."

Plaintiff's complaint, as ultimately amended, alleged that both articles were "of and concerning her" because her name was Eve Spiro John. Defendant moved to dismiss the complaint on the ground that neither of its publications was "of and concerning" plaintiff but, instead, were about Dorothy Clark-Dolores Reising, the plaintiff's landlady. The trial court sustained defendant's motion and dismissed the action. On appeal by plaintiff, however, the Appellate Court reversed the order of dismissal and remanded the cause with directions that defendant answer and that the cause be tried. (*John* v. *Tribune Co.* 19 Ill. App. 2d 547).

Thereafter, the cause was heard, the jury returned a verdict for defendant and judgment for defendant was entered on the verdict. On appeal by plaintiff the Appellate Court again reversed the judgment for defendant, this time for trial errors, and remanded the cause for a new trial. (28 Ill. App. 2d 300.) As previously related, the matter is now before us on leave to appeal granted.

Under the procedural background existing, the order of the Appellate Court in the first appeal is not binding upon us, and we may now review it as a part of the record in the case. (*Hall* v. *Chicago and North Western Railway Co.* 5 Ill.2d 135, 146-148.) Accordingly, defendant has renewed its attack on plaintiff's complaint and the first issue for determination is whether defendant's language can be read as "of and concerning" the plaintiff as she alleged in her complaint. Numerous decisions hold that whether an article is susceptible of the construction for which a plaintiff claims is a question of law for the court, to be resolved by reading the offending language stripped of innuendo. *Latimer* v. *Chicago Daily News, Inc.*, 330 Ill. App. 295; *Life Printing and Publishing Co.* v. *Field*, 324 Ill. App. 254; *Kulesza* v. *Chicago Daily News, Inc.* 311 Ill. App. 117; *Duvivier* v. *French*, 104 Fed. 278.

Under the affidavits filed pursuant to section 48 of the Civil Practice Act, plaintiff was a 27-year-old practicing psychologist, and resided in an apartment below the one raided. Her maiden name had been Eve Spiro and her name at the time, although divorced, was Eve John. She was the only person with that name at the address, but was in no manner involved with the raid, or any of the immoral activities of her landlady.

Neither of defendant's articles identifies more than one individual as the person arrested and charged as being the

keeper of the disorderly house, thus the defendant's language is either "of and concerning" the plaintiff's landlady or is "of and concerning" the plaintiff. The publications cannot, as they are written, be "of and concerning" both persons. The plaintiff is not 57 years of age, has never used the names Dorothy Clark or Dolores Reising, and is not the only person who, at the time of the publication, resided at 4417 South Ellis Avenue. No claim is made that the publications refer to plaintiff directly, but her contention that the language is "of and concerning" her is founded solely upon the fact that combinations of her full name, Eve Spiro, John, were reported as aliases, or also-knowns, of Dorothy Clark or Dolores Reising.

The term "alias," (or "also known",) has not escaped definition by the courts. Its meaning is clear and unambiguous. In *People* v. *Grizzel*, 382 Ill. 11, 24, we said: "When instructions are given using the name of the accused, followed by *alias* and another name, *alias* stands for *'alias dictus'* and indicates, not that the person referred to bears both names, but that he is called by one or the other, and hence, the use of either one of said names identifies the accused as the person referred to. The true name is that which precedes an *alias dictus*. An *alias dictus* is only reputation and is not the truth." This definition is consonant with those given to the term by other courts and by dictionaries. *State* v. *Melson*, 161 La. 423, 108 So. 794; *Ferguson* v. *State*, 134 Ala. 63, 32 So. 760; *People* v. *Mellon*, 11 N.Y.S. 2d 786; *Read* v. *Holmes*, 3 Bulstr. 296, 81 Eng. Rep. 245; Webster's New International Dictionary, 2d ed. 1957, p. 65.

When defendant's articles are read against the plain meaning of *"alias"*, (or "also known,") it is apparent that neither article is "of and concerning" the plaintiff. When *aliases* or assumed names appear in a publication, the first

name given is clearly the subject or "target" of the publication, and such fact is one of common knowledge. A name or names reported as the "*aliases,*" or also-knowns, are the names that have been assumed by the subject identified by the name preceding the *alias,* and this fact, too, is one of common knowledge and understanding. The *alias* names do not change the subject of the publication, (here Dorothy Clark-Dolores Reising,) but simply disclose the subject's false name or names. The *alias* names, therefor, necessarily cannot be read as identifying the "of-and concerning" or "target" name of the publication.

We further believe the language in defendant's articles is not libelous of plaintiff when the innocent construction rule is consulted. That rule holds that the article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law. Although this court has not heretofore expressed the rule, it has been adopted and applied by our Appellate Courts and by Federal Courts sitting in Illinois. (*LaGrange Press* v. *Citizen Publishing Co.* 252 Ill. App. 482; *Eick* v. *Perk Dog Food Co.* 347 Ill. App. 293; *Tiernan* v. *East Shore Newspapers, Inc.* 1 Ill. App. 2d 150; *Brewer* v. *Hearst Publishing Co.* 185 F.2d 846; *Epton* v. *Vail,* 2 Ill. App. 2d 287; *Fulrath* v. *Wolfe,* 250 Ill. App. 130; *Davis* v. *Ferguson,* 246 Ill. App. 318; *Dilling* v. *Illinois Publishing and Printing Co.* 340 Ill. App. 303; *Parmelee* v. *Hearst Publishing Co.* 341 Ill. App. 339; *Gogerty* v. *Covins,* 5 Ill. App. 2d 74; *Piacenti* v. *Williams Press, Inc.* 347 Ill. App. 440; *Sullivan* v. *Illinois Publishing Co.* 186 Ill. App. 268; *Crosby* v. *Time, Inc.* 254 F.2d 927; *Schy* v. *Hearst Publishing Co.* 205 F.2d 750; *Creitz* v. *Bennett,* 273 Ill. App. 88.) Since both of the publications here are capable of being construed as referring

only to Dorothy Clark-Dolores Reising as the keeper of the disorderly house, they are innocent publications as to the plaintiff.

We conclude that the publications are not "of and concerning" the plaintiff as she alleges in her complaint, and that the Appellate Court was in error on the occasion of the first appeal. Having so concluded, we do not reach the errors which go to the second appeal to the Appellate Court, nor do we affirm or deny the views then expressed by that court.

There remains the question of our jurisdiction, consideration of which we have purposely postponed so that it might be examined in light of the merits of the case. It is plaintiff's first contention that the defendant is not entitled to have the remanding order stricken pursuant to section 75(2)(c) of the Civil Practice Act, the rationale of her arguments being that it is only where a plaintiff loses a judgment in the Appellate Court that the section has application. She argues that the unsuccessful plaintiff in the Appellate Court may gamble all and waive remandment, but that an unsuccessful defendant cannot gamble away the plaintiff's right to a new trial in the same manner. Section 75(2)(c), however, does not distinguish between plaintiffs and defendants, but explicitly provides that in "any case" where there has been a trial on the merits and the successful "party" loses his judgment in the Appellate Court, such "party" may obtain a striking of the Appellate Court's remanding clause by filing the requisite affidavit. And since our decision in *Bowman* v. *Illinois Central Railroad Co.* 11 Ill. 2d 186, there can be no question but what the Appellate Court must strike the remanding order when the statutory affidavit is filed, and there can likewise be no doubt that this court has power in aid of its appellate jurisdiction to issue the appropriate extraordinary writ

to bring the record before it. The limitation contended for by the plaintiff is not now in the statute and we must follow its express language in the absence of legislative intent to the contrary. We conclude, therefore, that the defendant was entitled to have the remanding clause stricken by the Appellate Court, and that the cause is properly before us.

Plaintiff claims next that the order of the Appellate Court, after the remanding clause has been stricken, is not reviewable because the case cannot be completely adjudicated in this court. She strenuously urges that if the defendant fails here the case must be retried, with the result that defendant has lost nothing and the case has not been resolved by the appeal. These considerations, however, are no bar to our jurisdiction. Section 11 of article VI of the Illinois constitution confers jurisdiction upon this court "in such other cases as may be provided by law." Thus the legislature could constitutionally authorize an appeal in the circumstances of this case and in fact has done so by the plain terms of section 75(2)(c), which allows review here by leave to appeal after the remanding clause has been stricken from the Appellate Court's order. Furthermore, this is not the only instance where we have jurisdiction to hear an appeal even though our review may not finally dispose of the case. (*Cf. Van Dam* v. *Van Dam*, 21 Ill.2d 212; *Bagdonas* v. *Liberty Land and Investment Co.* 309 Ill. 103.) Here, since jurisdiction exists pursuant to section 75(2)(c) and the trial court must be affirmed, no question of the consequences of an affirmance of the Appellate Court, or of a denial of the petition for leave to appeal, is reached.

On the first appeal, as already discussed, the Appellate Court erroneously held that whether defendant's articles were subject to the construction claimed by plaintiff in her complaint was one of fact rather than law. After remand-

ment, trial, verdict and judgment for defendant the Appellate Court again held in effect that the complaint stated a cause of action. It is reasonable to assume that a second trial might result in a judgment which would prompt a third appeal and possibly another remandment. The parties could remain on such a tread-mill indefinitely through any number of trials following remandments by the Appellate Court. And according to plaintiff's contentions, the case might never be reviewed by this court unless or until a judgment is entered in the trial court which is not reversed or remanded for a new trial by the Appellate Court. Only then could we stop the fruitless cycle by a determination that the complaint upon which the numerous trials were predicated never stated a cause of action. Section 75(2)(c) was intended to streamline litigation by obviating in appropriate cases needless retrials and appeals. (*Bowman v. Illinois Central Railroad Co.* 11 Ill.2d 186, 197.) This is such a case.

Accordingly, and for the reasons stated, we reverse the judgment of the Appellate Court and reinstate and affirm the judgment of the circuit court in favor of the defendant.

Appellate Court reversed; circuit court affirmed.

MR. JUSTICE SCHAEFER, dissenting opinion:

This court is without jurisdiction to consider this case because the defendant has not taken the steps which are required by statute to make the judgment of the Appellate Court reviewable in this court. The constitution distributes jurisdiction between this court and the appellate courts. It provides that appeals and writs of error to review judgments of the appellate courts "shall lie to the supreme court, in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved; *and in such other cases as may be provided by law.*" (Const. art.

VI, sec. 11, Italics supplied.) Neither the validity of a statute nor a franchise or freehold is involved in this civil case. Jurisdiction therefore depends upon whether or not the case falls within the italicized clause of the constitution,—that is, upon whether or not jurisdiction to review the judgment of the appellate court has been otherwise "provided by law."

The only relevant statutory provision is section 75(2)(c) of the Civil Practice Act, which reads as follows: "(c) In any case heard and determined in the trial court upon actual trial in which the Appellate Court upon appeal from the final judgment or decree entered in the cause in the trial court reverses the judgment or decree and remands the cause for a new trial or hearing, and in which the party in whose favor the trial court's judgment or decree was rendered presents to and files with the Appellate Court an affidavit stating that he will be unable on a future trial or hearing to adduce other or additional evidence, facts or circumstances than were adduced in the trial court and expressly waiving the right to a new trial or hearing and consenting and requesting that the portion of the judgment of the Appellate Court remanding the cause for new trial or hearing be deleted and stricken from the judgment of the Appellate Court, then that court upon motion shall amend its judgment by striking out the portion thereof remanding the cause for new trial or hearing. Thereupon it is competent for the Supreme Court to grant leave to appeal from such final judgment of reversal for its review and determination with the same power and authority in the case, and with like effect, as in other cases in which leave to appeal from the final judgments of the Appellate Courts is authorized in this section." Ill. Rev. Stat. 1961, chap. 110, par. 75.

In the present case the defendant has refused to take the steps required by the statute, and therefore this court is without jurisdiction. Although the facts are clear and the parties have argued their legal effect, the opinion of this court fails to mention the matter, and therefore it is necessary to state the relevant circumstances here. The affidavit in support of the defendant's motion to strike the remanding clause did not, as the statute requires, contain any statement "expressly waiving the right to a new trial or hearing." Instead it stated that the affiant "expressly and affirmatively states that nothing contained in the affidavit is in any way a consent to the entry of any ultimate finding of any liability of any money judgment against the defendant-appellee • • •."

If there was any doubt as to the meaning of this reservation, it is removed by the following statements of the defendant in support of the motion it made in this court to require the Appellate Court to strike its order remanding the cause for new trial: "Thus once the remanding order is stricken in accordance with the section (75(2)(c)) the case comes before this Court with a final order, *i.e.*, reversed. If the Court does in its discretion hear the case and holds the Appellate Court was correct in reversing the judgment (or affirms the Appellate Court for whatever reason) the remanding order would be reinstated here. If, on the other hand, review is not granted, either this Court, in its order denying the petition for leave to appeal (or the Appellate Court itself) would reinstate the remanding order so that the plaintiff could proceed to the ordered retrial. • • • We freely concede that different consequences may flow as between a plaintiff and a defendant in the filing of the Section 75(2)(c) motion and affidavit, *i.e.*, a plaintiff's filing results in his losing all right to a retrial while a defendant's filing apparently results in his

being precluded upon any retrial from making any defenses or offering any evidence not made at the first trial."

Thus it is clear that the defendant did not, as section 75(2)(c) requires, file an affidavit "expressly waiving the right to a new trial or hearing." Instead, it expressly sought to reserve the right to a new trial, and to substitute for the required statutory waiver an anomalous procedure by which the new trial is waived if the defendant ultimately prevails, but is not waived if the plaintiff prevails. Of course the statute does not authorize such a procedure, and this court is without jurisdiction.

MR. CHIEF JUSTICE HERSHEY concurs in this dissenting opinion.

APPENDIX II

FIRST APPELLATE COURT OPINION

JUSTICE SCHWARTZ delivered the opinion of the court.

In this action for libel the defendant filed a motion to strike the third amended complaint and supported its motion with an affidavit setting up what purports to be affirmative matter pursuant to Section 48(1)(i) of the Practice Act [Ill. Rev. Stat. 1957, ch. 110, § 48(1)(i)]. The court sustained the motion and dismissed the suit. From that order plaintiff has appealed. The principal question in the case concerns liability for libel where there is a confusion of identities. Also involved is the propriety of a motion under Section 48(1)(i) to raise this question where the complaint charges that the libel was of and concerning the plaintiff.

The case grows out of two news items in defendant's newspaper describing a police raid of an apartment at 4417 Ellis Avenue, Chicago, in which a number of women were arrested. On March 30, 1952, defendant published an article describing the raid, saying: "Dolores Reising, 57, alias Eve Spiro and Eve John, who, police said, was known years ago as Accardo's woman friend, was held as the suspected keeper of the apartment." On March 31, 1952, defendant published another article, saying that the five women arrested in the raid would appear in the Women's court Wednesday and that "Dorothy Clark, 57, who gave 4417 Ellis Ave. as her address, was charged with being keeper of a disorderly house. . . . Police said she is also known as Dolores Reising, Eve Spiro, and Eve John, and was known years ago as a girl friend of Tony Accardo, Capone gangster." Plaintiff's name at the time was Eve John and her maiden name was Eve Spiro. She lived in an

apartment below the one raided and it is alleged in the complaint that she was the only person with that name at that address. The complaint alleges that the articles were understood by readers of defendant's newspaper to refer to plaintiff; that the statements were false and had seriously damaged plaintiff's reputation and caused her severe mental and physical distress and loss of practice as a psychologist.

Prior to the entry of the order here in question, the court had stricken two previous complaints and had given plaintiff leave to amend. A motion to strike and dismiss the second amended complaint was denied on July 2, 1953, and defendant was ordered to answer. An answer was filed July 21, 1953. Following this, Dorothy Clark's deposition was taken and filed February 15, 1955.

On June 26, 1957, defendant filed a motion for summary judgment and stated as reason therefor that the language complained of was not of and concerning plaintiff and not libelous as a matter of law, but was true as a matter of law, and that Dorothy Clark, alias Dolores Reising, did in fact use the names Eve Spiro and Eve John. On the same date plaintiff was given leave to file affidavits and counter-affidavits. On August 1, 1957, the affidavit of Don H. Reuben, one of the attorneys for defendant, was filed in support of defendant's motion for summary judgment, and on August 30, 1957, the affidavit of Eve John was filed in opposition to defendant's motion for summary judgment. On September 17, 1957, the motion for summary judgment was denied; but apparently on the court's own motion the second amended complaint was stricken and plaintiff was granted leave to file a third amended complaint "pleading special damages." A motion to reconsider and vacate that portion of the order of September 17, 1957, striking the second amended complaint was denied, but the court amended its order by striking therefrom the language

which related to "pleading special damages." Thereupon plaintiff filed the third amended complaint.

It was after the filing of the third amended complaint that defendant filed its motion to strike and dismiss pursuant to Section 48(1)(i), which the court sustained. That motion is based on the ground that upon the face of the complaint and as appears from the affidavit of Don H. Reuben and the deposition of Dorothy Clark, the language is not of and concerning plaintiff and is not libelous. That was in substance a renewal of the motion for a summary judgment which had been previously heard and denied.

[1] The first question to be determined is the nature of the issue presented by the motion and objections thereto. That the language of the articles is libelous per se is not open to question. Defendant in its brief introduces its description of the raid by the statement: ". . . the police believing the house was used for prostitution raided it. . . ." The articles relate to a person whose name was Dolores Reising or Dorothy Clark, age 57, alias Eve Spiro and Eve John, living at 4417 Ellis Avenue. The word "alias" is derived from alius, meaning "other," so that the article, understood both in its ordinary and its derivative sense, meant that a person who had the name of Dorothy Clark or Dolores Reising, also used other names, to-wit: Eve Spiro and Eve John, and was the keeper of a house of prostitution and the girl friend of a gangster.

[2] Defendant argues that the first name given in such articles is the real name in common understanding, and that the names following the first name are considered to be aliases or fictitious. Names are tags of identity. In a community where there are many John Smiths, it is not uncommon for one who bears that name to adopt a Q, X, Y or Z as a middle initial or to adopt a number in addition to his name. It is sometimes assumed that the first name

given in a description of the sort here in question is the birth name and that the names which follow are those later adopted. It is an assumption which quickly disappears, especially when reference is made to a notorious person. Certainly, there is no presumption in law, prima facie or conclusive, to that effect.

In the instant case the first article referred to Dolores Reising and (adding to the confusion) the second referred to her as Dorothy Clark, but in each instance the names of Eve Spiro and Eve John were attached as aliases. A reader of one of the articles might have concluded that the name was Dolores Reising or Dorothy Clark, according to which article was read first, but those who read both articles would certainly have understood that this was just a way of writing the story and that neither police nor reporters knew the real name.

[3] What is presented for trial in this case is a question of fact and not of law. The question is whether readers of the articles did and could reasonably understand them to refer to plaintiff. *Ball* v. *Evening American Pub. Co.*, 237 Ill. 592 (1909); *Ogren* v. *Rockford Star Printing Co.*, 288 Ill. 405, 413; *Palmer* v. *Bennett*, 83 Hun 220, 31 N.Y. Supp. 567 (1894); *Roth* v. *Greensboro News Co.*, 217 N.C. 13, 6 S.E. 2d 882; *Jones* v. *E. Hulton Co.*, 2 K.B.D. 444, aff'd 1910 Appeal Cases 20; *Algozino* v. *Welch Fruit Products Co.*, 345 Ill. App. 135, 143; *Walker* v. *Bee-News Pub. Co.*, 240 N.W. 579 (Nebr. 1932); *Washington Post Co.* v. *Kennedy*, 3 F. 2d 207.

[4, 5] Defendant makes the point that the discrepancy between plaintiff's age (26 or 27 at the time of publication of the articles) and the age given in the news article, 57, was such that "as a matter of law no reader would or did ever believe" that plaintiff was the subject of the publications. That is merely an item of evidence, to be

considered by a trier of fact. *Roth* v. *Greensboro News Co.*, 217 N.C. 13, 6 S.E. 2d 882.

[6, 7] Having concluded that what was presented to the court involved an issue of fact, could such an issue be disposed of by motion to dismiss under Section 48? The main purpose of that section (aside from (1)(i)) is to provide for a disposition of a case upon such defenses as jurisdiction of the court, legal capacity to sue and be sued, prior judgment, and other defenses which may be decided by resort to a record or matter so conclusive that a plaintiff could not deny it. However, Section 48(1)(i) which has been added seems to have embarked on a field the limits of which are not as yet defined. It provides for the use of the motion when "the claim or demand asserted by a defendant is barred by other affirmative matter voiding the legal effect of or defeating a claim or demand." This might be taken to mean any plea of new matter, factual or otherwise. Obviously, it cannot have such a broad interpretation, for so applied it could result in a trial without a jury (although one may have been demanded), without oral evidence and without cross examination. We will not undertake to define the limits of Section 48(1)(i) at this time, but it is clear that where the affirmative matter, so-called, is nothing more than evidence upon which a defendant expects to contest a vital fact stated in a complaint, such as the averment in the instant case that the libelous language was said of and concerning plaintiff, the motion to dismiss under Section 48(1)(i) is not proper. An issue is presented, to be tried in ordinary course.

The order is reversed and the cause is remanded with directions to deny the motion, to direct defendant to answer, and to set the cause down for trial, and for such other and further proceedings as are consistent with the views herein expressed.

Order reversed and cause remanded with directions.

McCORMICK, P. J. and ROBSON, J., concur.

APPENDIX III

SECOND APPELLATE COURT OPINION

MR. JUSTICE McCORMICK delivered the opinion of the court.

A suit was brought by Eve Spiro John, hereafter referred to as the plaintiff, against Tribune Company, hereafter referred to as the defendant. The basis of the suit was the publication by the defendant of two stories which the plaintiff alleged libeled her. The case was tried before a jury, which returned a verdict in favor of the defendant upon which the court entered judgment. Plaintiff's post-trial motions for a new trial or judgment notwithstanding the verdict were overruled. This appeal follows.

The plaintiff here contends that she did not have a fair trial, that the trial court committed prejudicial errors in the conduct of the trial in excluding proper evidence offered by the plaintiff and in admitting immaterial and prejudicial evidence on the part of the defendant, and that the court improperly refused certain jury instructions offered by the plaintiff.

The case was before this court once before (*John* v. *Tribune Co.*, 19 Ill. App. 2d 547, 154 N.E. 2d 862). In that appeal we set aside an order of the trial court striking the third amended complaint of the plaintiff and dismissing the suit, and the opinion contains the following statement:

> "The case grows out of two news items in defendant's newspaper describing a police raid of an apartment at 4417 Ellis avenue, Chicago, in which a number of women were arrested. On March 30, 1952, defend-

ant published an article describing the raid, saying: 'Dolores Reising, 57, alias Eve Spiro and Eve John, who, police said, was known years ago as Accardo's woman friend, was held as the suspected keeper of the apartment.' On March 31, 1952, defendant published another article, saying that the five women arrested in the raid would appear in the Women's court Wednesday and that 'Dorothy Clark, 57, who gave 4417 Ellis Av. as her address, was charged with being keeper of a disorderly house. . . . Police said she is also known as Dolores Reising, Eve Spiro, and Eve John, and was known years ago as a girl friend of Tony Accardo, Capone gangster.' Plaintiff's name at the time was Eve John and her maiden name was Eve Spiro. She lived in an apartment below the one raided and it is alleged in the complaint that she was the only person with that name at that address. The complaint alleges that the articles were understood by readers of defendant's newspaper to refer to plaintiff; that the statements were false and had seriously damaged plaintiff's reputation and caused her severe mental and physical distress and loss of practice as a psychologist."

It was there held that the language of the articles was libelous per se, and the court says: "What is presented for trial in this case is a question of fact and not of law. The question is whether readers of the articles did and could reasonably understand them to refer to plaintiff." The cause was remanded for trial.

The defendant thereupon filed an answer to the third amended complaint of the plaintiff, in which it admits that a raid on the premises at 4417 South Ellis Avenue, Chicago, occurred and a number of women were arrested; that plaintiff resided at 4417 South Ellis Avenue in the apartment below the apartment which was raided on March 29, 1952; that she was not present in the raid, nor was she taken to the police station; that the police records did not contain plaintiff's name; and that the defendant pub-

lished the articles in question in the Chicago Tribune. Defendant stated it did not have sufficient information to admit or deny that at the times material herein plaintiff's true name was Eve John and that her name before she was married was Eve Spiro. The defendant denied that it published the articles intending to injure the plaintiff in her good name and denied that statements in the articles concerning Eve Spiro and Eve John refer to the plaintiff. It stated that it had no knowledge concerning what person other than the plaintiff at 4417 Ellis Avenue used the names Eve Spiro and Eve John "save that defendant is informed and believes that plaintiff's landlord who resided on the premises has on occasions used said names." Defendant denied that it meant by the article that the plaintiff was unchaste and had been an inmate of a resort for dissolute persons, that the publications were so understood by the readers of the paper, and that the articles charged the plaintiff with any wrongdoing whatsoever or that the plaintiff has by the publication of the articles been injured in her reputation.

During the trial of the case the plaintiff testified that she had lived in the apartment at Ellis Avenue for about seven years before the raid. The building was a three-story building with a basement, the front part of which had been converted into an apartment occupied by the plaintiff. She also testified that her maiden name was Eve Spiro; that her legal name at the time of the raid was Eve Spiro John; that at that time she had been divorced from her husband Roy John and he was not living with her; that she had two daughters who did live with her; that at the time in question she worked as an intern at the Veteran's Administration, was a research assistant at the University of Chicago, did occasional lecturing, and taught at the Lawson YMCA in the adult education division in the evenings. She was also then working for her

doctor's degree (Ph.D. in psychology, which she received in 1953). She had previously worked part time at Mt. Sinai Hospital Dispensary as a chief clinical psychologist. She stated that at the time of the publication she was listed in the telephone directory under the name of Eve Spiro John, with her address that of the apartment; that she was then 27 years old; and that while she was living there she was preparing her doctoral thesis. The plaintiff was called as an adverse witness and over objection the defendant asked the following questions, after having the thesis of the plaintiff marked for identification and identified by the plaintiff, and the following answers were given:

> "Q. This book dealt with sex in part and intersexuality, did it not? A. Not as commonly construed at all.
>
> "Q. Well, did it deal—forgive me for asking these questions, but did it deal with attitudes toward sexual activities for example? A. There was one rating scale which I used in determining the state of mental health of the subjects and that rating scale was used, yes. It related essentially to you how these people regarded loving others.
>
> "Q. Well, did it? A. This is called sexuality in psychology, but it is not what the common man refers to, I think, by sexuality."

The defendant then offered the thesis in evidence, to which offer the plaintiff objected. The book was admitted in evidence. It appears in the record as a book of 155 typewritten pages. In it there is a discussion of hetero- and homosexuality, and on at least one page of the book the discussion is quite frank and of a character which could be easily misunderstood by a person not familiar with the psychological connotations therein involved. The reason for offering the book apparently was not at the time it

was offered, nor in this court, crystal clear to the defendant. In the trial court the defendant took the view that it tended to impeach the plaintiff, since the plaintiff had by implication indicated that she did not know that her landlady was keeping a house of prostitution.

The plaintiff objected to the introduction of the book on the ground that it was immaterial, irrelevant and prejudicial.

In this court the defendant contends that the document was relevant and impeaching evidence; that if plaintiff had been aware of her landlady's activities it would be a matter for the jury to consider in determining "reputation and damages"; that the fact that the plaintiff wrote this book would indicate that she had the kind of education and knowledge which would cause her to be aware of the house activities; and that it was not prejudicial because, as said in its brief: ". . . the obviously scientific discussion of sexual attitudes contained in the latter portion of the work is to be expected in light of today's widespread discussion and interest in the relationship between sex and human behavior."

[1, 2] It is ordinarily considered that when matter offered in evidence is relevant and material but is in its nature prejudicial the court should balance these elements one against the other, and if the importance of the matter as evidence outweighs the danger of its prejudicial effect upon the jury, it should be admitted. In the case before us we are not required to go that far. The book was totally irrelevant and immaterial. It was hearsay and did not in any way tend to impeach any statement made by the plaintiff on the witness stand. Nor were there any admissions in the book contradicting the position taken by the plaintiff in the trial of the case. Apparently the defendant also contends, disregarding the theory of impeachment,

that the book could be considered as independent evidence on its behalf as affecting the reputation of the plaintiff and mitigating the damages. Such a position is untenable and has no basis whatsoever in law. The document, as we have said, was irrelevant and immaterial, and the statements therein contained were of a character which might appeal to the sympathy, passion or prejudice of a jury and influence it to find against the plaintiff. *People* v. *Decker*, 310 Ill. 234, 244, 141 N.E. 710.

The defendant stresses the fact that the jury would not have had time to read the entire book. This court can take judicial notice that where a book of this character is involved, it does not require much time for a juror to pick out the salient passages and call the attention of the other jurors thereto. In our opinion the introduction of this irrelevant and immaterial evidence served no conceivable purpose in the trial of the case, was highly prejudicial, and was reversible error. *Jones & Adams Co.* v. *George*, 227 Ill. 64. The questions asked plaintiff concerning the thesis were also improper.

As the case must necessarily be retried, in order to prevent some of the other errors cropping up in the new trial we will here discuss them.

At the trial the plaintiff, in order to prove that the articles were believed by readers to refer to her and that she thereby suffered damages, offered to testify about telephone calls she had received on or about the date of the publications, as well as conversations had with her. These calls and conversations were offered for the purpose of showing that the persons identified the plaintiff as the person mentioned in the articles. The defendant objected to this evidence on the grounds that it was hearsay and that the plaintiff had precluded herself by certain objections she had made to written interrogatories propounded

by the defendant. The defendant's interrogatories asked for the names and addresses of all persons who the plaintiff claims construed the articles as referring to her, as well as the names and addresses of all persons who have knowledge concerning plaintiff's reputation as of the time of the publications, and the names and addresses of all persons who have knowledge concerning any alleged damage caused to the plaintiff by the publications. The plaintiff filed objections to the interrogatories on the grounds that they were irrelevant and immaterial, that the issue of whether the libelous publications were of and concerning the plaintiff does not depend on the construction placed upon the publications by individual persons, and that damages were not an issue in the case since in the previous decision of the Appellate Court the articles were held to be libelous *per se*. A month later the defendant's attorney wrote to plaintiff's attorney and said, with reference to the objections to the interrogatories filed:

> "... You will recall that at the time we agreed to defer having a hearing concerning your objections while I was away on vacation and thereafter I advised you that we would consider what, if anything, we further wished to do concerning your objections.
>
> "We shall accept the position taken in the objections concerning the immateriality and irrelevancy of the evidence or facts sought to be elicited by the questions. Accordingly, having accepted your view concerning what is immaterial and irrelevant in the cause, we shall of course not set your objections down for hearing."

The interrogatories were filed under Rule 19-11 of the Supreme Court, which, among other things, provides that within ten days after the service of interrogatories written objections may be served, together with a motion for the hearing of the objections, and that "Answers to interrogatories to which objection is made shall be deferred

until the objections are determined . . . Interrogatories may relate to any matters which might be inquired into by deposition. The answers may be used in evidence to the same extent as the deposition of an adverse party."

[3] The interrogatory asking for the names of those persons known to the plaintiff who had interpreted the articles as being about plaintiff was proper under Supreme Court Rules 19-4 and 19-11 as interpreted in *Krupp* v. *Chicago Transit Authority*, 8 Ill. 2d 37, 132 N.E. 2d 532, and *Hruby* v. *Chicago Transit Authority*, 11 Ill. 2d 255, 142 N.E. 2d 81. We gravely question the propriety of the interrogatories asking for the names of persons known to the plaintiff who have "knowledge concerning the plaintiff's reputation as of the time of the publication . . ." and of those who have "knowledge concerning any alleged damage caused to the plaintiff by the defendant's publications . . . ."

Rule 19-12(3) provides that if a party unreasonably refuses to comply with Rule 19-11 or any order entered under such rule the court may order that the party be nonsuited, that his complaint be dismissed, that all or any portion of his pleadings be stricken and judgment rendered on the remaining pleadings in the case, that he be debarred from filing any other pleading or from maintaining any particular claim, counterclaim, third-party complaint, or defense respecting which discovery is sought, or that further proceedings be stayed pending compliance.

The view of the defendant is that the plaintiff had "refused" to disclose the names sought in the interrogatories and at the trial the court was justified in refusing to permit the plaintiff to submit such evidence. In support of such contention defendant, after stating that there are no Illinois cases on the subject, cites certain federal cases: (*Fisher* v. *Underwriters at Lloyd's London*, 115 F.2d 641

(plaintiff refused to answer interrogatories); *Hipp* v. *Hipp*, 134 A. 2d 493 (Munic. Ct. App. D.C. 1957—a party had refused to appear for a deposition concerning alimony and he was not permitted to testify at the hearing on the motion for alimony); *Alamo Theatre Co.* v. *Loew's, Inc.*, 22 F. R. D. 42 (N. D. Ill. 1958—where the plaintiff, in answer to defendants' interrogatories, made admissions that it had no knowledge or information to substantiate certain factual allegations of the complaint, the court would not require defendants to answer plaintiff's interrogatories in the nature of a fishing expedition for facts to support its allegations, and such allegations were stricken and plaintiff's further interrogatories were restricted to remaining cause of action).

[4, 5] Here the plaintiff filed objections based on her attorneys' interpretation of the law. In the letter from the defendant's counsel he agreed that the facts sought to be elicited by the interrogatories were immaterial and irrelevant. The agreement was only that it was not necessary for the plaintiff to answer the interrogatories. The plaintiff did not fail to comply with Rule 19-11. Either party could have asked for a ruling of the court. Even if the court had ruled on the question as to whether or not it was necessary for the plaintiff to answer the interrogatories, its ruling would not have adjudicated the admissibility of the answers in evidence, but only determined the relevancy of the information sought to the subject matter in the pending action. *Bowles* v. *Safeway Stores*, 4 F.R.D. 469. Answers to interrogatories are not pleadings. *Dunleer Co.* v. *Minter Homes Corp.*, 33 F. Supp. 242; *Bowles* v. *Safeway Stores, supra*; *P. Rielly & Son* v. *National Parlor Furniture Co.*, 192 Ill. App. 395. In *Ross* v. *Ross*, 113 A. 2d 700 (N. J.), the court says that answers to interrogatories are not pleadings, that they are in the nature of evidence and do not alter the pleadings, and under

ordinary circumstances they should not have the effect of limiting the party's proof in the way that pleadings do. See also 4 Moore's Federal Practice (2nd ed.), par. 33.29 [2]; *Fitzpatrick* v. *St. Louis-San Francisco Ry. Co.*, 300 S.W. 2d 490, 500 (Mo.). That being true the interrogatories, standing alone, could not be considered pleadings, nor could they in any way limit the evidentiary proof in the trial. *P. Rielly & Son* v. *National Parlor Furniture Co.*, 192 Ill. App. 395.

[6] In the case before us answers to the interrogatories were not filed, nor was there any ruling by the court with reference to the relevancy of the interrogatories. Had the court ruled that the interrogatories were relevant and had ordered the plaintiff to answer and the plaintiff then wilfully refused, the action of the trial court in excluding evidence might be justified. There was nothing in the nature of an estoppel, nor was there anything in the nature of an agreement as to a rule of law governing the trial of the case.

[7, 8] It has been frequently held in this State that evidence may be introduced to identify the plaintiff as the one referred to in the libelous publication. *Ball* v. *Evening American Pub. Co.*, 237 Ill. 592, 86 N.E. 1097; *Nelson* v. *Borchenius*, 52 Ill. 236; *Merrill* v. *Marshall*, 113 Ill. App. 447. The plaintiff's testimony as to what persons said to her indicating that they associated her with the Eve John or Eve Spiro named in the publications was admissible.

[9] Where knowledge, belief, reasonableness and sanity, etc. are among the issues on the trial, declarations made by the person in question or others may constitute circumstantial evidence bearing on the issues, and the hearsay rule would have no application. Wigmore on Evidence, 3rd ed., secs. 266 and 1788-90; McCormick on Evidence, secs.

268, 269 and 273; 31 C. J. S. Evidence, sec. 255. (Some writers consider such testimony is hearsay but should be admitted under an exception to the hearsay rule.) As far as our discussion here is concerned, the important factor is that the evidence is admissible. In *Towne* v. *Towne*, 191 Ill. 478, 482, 61 N.E. 426, where the question involved was whether a deceased member of a benefit society knew of and acquiesced in a mistake made by the clerk of the society in the names of the beneficiaries when making out a new certificate, the court held that declarations made by the insured during the time he retained the certificate were competent. The court said: "The thing in question, however, was the state of his mind and his intention and understanding as to the certificate. The mistake having been made, the court was called upon to decide whether he knew of it or acquiesced in it, and his conduct, demeanor and declarations concerning the certificate were all evidence on that subject." See also *Land & Wife* v. *Inhabitants of Tyngsborough*, 63 Mass. 36, at page 43, where the court says: "Perhaps the most common and largest class of cases in which declarations are admissible, is that in which the state of mind or motive with which any particular act is done is the subject of inquiry." The court calls attention to the reception in evidence of the cries of the mob in the trial of Lord George Gordon as tending to explain the purpose and intent of the multitude which the prisoner had called together and which accompanied him when he presented his petition to parliament.

Jozwiak v. *Sadek* [1954] 1 All E. R. 3, was a case decided in the Queen's Bench Division in 1953. It was an action for libel where the issue was as to whether the words appearing in the newspaper related to the plaintiff, and the plaintiff sought to tender evidence of anonymous telephone messages received by him, after the publication, and of statements made at public meetings. The court held

that such evidence should be admitted over the defendant's objection that it was hearsay, and the court says:

> "I have come to the conclusion that it should be admitted . . . There are two older authorities which probably are more in point. One of them is *Cook* v. *Ward*, [(1830), 6 Bing. 409], which was a libel action in which, in order to identify the plaintiff with the libel, evidence was called of laughter and statements which had been made at a vestry meeting. It was held that the evidence was admissible on that ground, *i.e.*, on the ground that it identified the plaintiff with the subject of the libel. Equally, in *Du Bost* v. *Beresford*, [(1810), 2 Camp. 511], the question arose, although, in fact, the action was not a libel action, whether the subject of a picture was libellous, and it was held that evidence was admissible of remarks made by persons who saw the picture when it was exhibited, to show that those persons had identified the subject of the libel with the plaintiff. The report is a short one, but the note is (2 Camp. 512):
>
> " 'In the course of the trial Lord Ellenborough held upon argument, that the declarations of the spectators, while they looked at the picture in the exhibition room, were evidence to show that the figures portrayed were meant to represent the defendant's sister and brother-in-law.'
>
> "On the authority of those decisions, and indeed, I think, on the application of the ordinary principles of evidence, I feel that I ought to admit the evidence of statements made at meetings . . . which took place after the publication of this story: and if that be so, I fail to see that I am extending the principle if, at the same time, I hold that evidence of telephone communications to the plaintiff in which similar statements were made is admissible in evidence."

The trial court erred in refusing to permit the plaintiff to testify concerning the various telephone calls received

by her after the publication of the alleged libel and which identified her as the party therein referred to.

[10-13] The issues formed by the pleadings in this case were whether the articles admittedly published by the defendant referred to the plaintiff and were so understood by the readers of the newspaper and the employers of the plaintiff, namely, the administration of the University of Chicago and the head of the Veterans Administration. In *Peck* v. *Tribune Co.*, 214 U.S. 185, the court, considering whether a publication was libelous, says: "As was said of such matters by Lord Mansfield, 'Whatever a man publishes he publishes at his peril'. *The King* v. *Woodfall*, Lofft 776, 781." In *John* v. *Tribune Co., supra*, the court found that the articles were libelous *per se*. Consequently the law conclusively presumes malice in law, and general damages, without proof of loss or injury, are conclusively presumed. *Cook* v. *East Shore Newspapers, Inc.*, 327 Ill. App. 559, 595, 64 N.E. 2d 751. In the latter case it is also further pointed out that where the article is libelous *per se* there may also be malice in fact, and the court says: "Malice in fact is 'a formed design of doing mischief to another.' (*First Nat. Bank of Flora* v. *Burkett*, 101 Ill. 391, 394.) It is also defined as follows: 'actual malice or malice in fact, means a positive desire and intention to annoy or injure another person.' (34 Am. Jur. p. 681.)" The existence of actual malice may be inferred where a defamatory publication is made without proper cause or excuse. Where malice in law or actual malice exists punitive damages may be awarded. *Cooper* v. *Illinois Pub. & Printing Co.*, 218 Ill. App. 95; *O'Malley* v. *Illinois Pub. & Printing Co.*, 194 Ill. App. 544; *Hintz* v. *Graupner*, 138 Ill. 158, 27 N. E. 935; *Lion Oil Co.* v. *Sinclair Refining Co.*, 252 Ill. App. 92, 105. In a case such as the instant case, where there is no plea of justification nor claim of knowl-

edge, the defendant may, in order to mitigate at least punitive damages, show circumstances which could negative actual malice. Such evidence cannot be considered as having any effect on the existence of malice in law, nor can it be admitted if it tends to prove the truth of the charge. In *Thomas* v. *Dunaway*, 30 Ill. 373, at 388, the court holds that where a plea of general issue and justification has been filed, evidence introduced by the defendant to support justification which fails to prove the truth of the article may be properly considered by the jury in mitigation of damages.

[14, 15] In the case before us the defendant has pleaded that it had no intent to charge the plaintiff with any wrongdoing. On the issue that the article as presented did not refer to the plaintiff but referred to the plaintiff's landlady, Reising or Clark, the defendant sought to introduce evidence from the reporter at the police station immediately following the raid that he got his information concerning the identity of the keeper from two police officers at the station, one of whom at the time of the trial was dead. He was permitted to give this evidence over the objection of the plaintiff. Where the publication of defamatory matter is shielded by no privilege it will be no justification or defense that the defendant in good faith believed the charges to be true and was not animated by ill will or actual malice, even though the defendant had probable cause for such belief. However, in order to negative actual malice and for the purpose of mitigating punitive damages, the defendant may prove that he in good faith believed the charges to be true, and, as evidence of that belief, show that he had received the information upon which the libelous statement was based from a third party and that after having made a sufficient investigation he believed the

charges to be true. 53 C. J. S. Libel and Slander, sec. 138; *Spolek Denni Hlasatel* v. *Hoffman*, 204 Ill. 532, 68 N. E. 400; *Stephens* v. *The Commercial News Co.*, 164 Ill. App. 6; *Cobbs* v. *The Chicago Defender*, 308 Ill. App. 55, 31 N.E. 2d 323; *Kulesza* v. *Alliance Printers & Publishers*, 318 Ill. App. 231, 47 N.E. 2d 547; *Cook* v. *East Shore Newspapers*, *supra*. However, such testimony should be offered for that restricted purpose and the plaintiff should be entitled to an instruction so limiting it. *Spolek Denni Hlasatel* v. *Hoffman*, *supra*, 537, 539.

The defendant introduced in evidence a deposition of the landlady of the plaintiff, Dorothy Clark, taken by the defendant in January 1955. In laying the foundation for the introduction of the deposition the defendant offered a witness, an employee of the attorneys for the defendant, who testified that on the Wednesday before the trial (the trial was commenced on Thursday) he had attempted to serve Dorothy Clark with a subpoena at the address at which she had been arrested; that he did not find her there, nor were there any white people living in the building. The defendant next called another employee of the attorneys for the defendant, who testified that he had, in attempting to locate Clark, found out the firm of attorneys by whom she had at one time been represented; that both members of the firm told him that she was living out of the State—in the State of Wisconsin—and that he did not try to locate her in that State. Upon this evidence the court permitted the deposition to be read in evidence.

[16, 17] The deposition should not have been permitted in evidence unless the defendant made a showing that the attendance of the absent witness could not have been procured by the use of reasonable diligence. An attempt to procure the witness the day before the trial has been held

to be a lack of diligence. *Devine* v. *Chicago City Ry. Co.*, 182 Ill. App. 366, and cases cited at p. 368. That case also holds that while the right to receive such testimony was a matter of discretion for the trial judge, where recognized rules of procedure are so far ignored as to result in substantial injustice, it amounts to an abuse thereof and constitutes error. The evidence with reference to what the investigator was told by attorneys who had at some time represented Clark was purely hearsay and in no sense competent. 26A C. J. S. Depositions, sec. 92(2)b(c)bb [p. 441]. The investigation made by the defendant upon which the court permitted the reading of the deposition was purely perfunctory. We are not making any comment upon what weight should be attached to the deposition had it been properly introduced in evidence.

We find no error in the court's refusal to give certain instructions tendered by the plaintiff.

The judgment of the Circuit Court is reversed and the cause remanded for further proceedings consistent with the views expressed in this opinion.

Reversed and remanded.

SCHWARTZ, P. J. and DEMPSEY, J., concur.